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THE FACEBOOK, INC. and MARK ZUCKERBERG

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

THE FACEBOOK, INC. and MARK ZUCKERBERG,

Plaintiffs,

v.

CONNECTU, INC. (formerly known as CONNECTU, LLC), CAMERON WINKLEVOSS, TYLER WINKLEVOSS, DIVYA NARENDRA, PACIFIC NORTHWEST SOFTWARE, INC., WINSTON WILLIAMS, WAYNE CHANG, and DAVID GUCWA,

Defendants.

Case No. 5:07-CV-01389-RS

DECLARATION OF THERESA A. SUTTON IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS MOTION TO DISMISS

Date: October 10, 2007
Time: 9:30 a.m.
Judge: Honorable Richard Seeborg

Dockets.Justia.com

I, Theresa A. Sutton, declare as follows:

1. I am an attorney with the law firm of Orrick, Herrington & Sutcliffe LLP, counsel for Plaintiffs FaceBook, Inc. and Mark Zuckerberg in the above-captioned action. I am a member of the Bar of the State of California. I make this Declaration in support of Plaintiffs' Opposition to Defendants' Motion to Dismiss. I have personal knowledge of the facts set forth in this declaration and could and would competently testify thereto under oath if called as a witness.

1. Attached hereto as **Exhibit A** is a true and correct copy of relevant excerpts of the October 25, 2006, hearing transcript in *ConnectU, LLC v. Zuckerberg, et al*; Case No. 04-cv-11923-DPW, District of Massachusetts.

2. Attached hereto as **Exhibit B** is a true and copy of Facebook's August 17, 2005, Complaint filed in Santa Clara Superior Court, Case No. 1:05-CV-047381.

3. Attached hereto as **Exhibit C** is a true and correct copy of Defendants' Reply to Opposition to Motion to Quash Service of Complaint and Summons For Lack of Personal Jurisdiction, filed on May 24, 2006, Santa Clara County Superior Court. **[CONFIDENTIAL DOCUMENT SUBMITTED SEPARATELY UNDER SEAL]**

4. Attached hereto as **Exhibit D** is a true and correct copy of Plaintiff's Objections to [the Magistrate Judge's] Report and Recommendation Dated March 2, 2007, filed on March 16, 2007 in *ConnectU, LLC v. Zuckerberg, et al*; Case No. 04-cv-11923-DPW, District of Massachusetts.

5. Attached hereto as **Exhibit E** is a true and correct copy of relevant exhibits from ConnectU's production. **[CONFIDENTIAL DOCUMENT SUBMITTED SEPARATELY UNDER SEAL]**

6. Attached hereto as **Exhibit F** is a true and correct copy of the September 26, 2006, Amended Notice of Subpoena to Pacific Northwest Software in *ConnectU, LLC v. Zuckerberg, et al*; Case No. 04-cv-11923-DPW, District of Massachusetts.

7. Attached hereto as **Exhibit G** is a true and correct copy of the October 9, 2006 email from Pacific Northwest Software's ("PNS") counsel to Facebook's counsel indicating PNS would produce responsive documents without objection.

8. Attached hereto as **Exhibit H** is a true and correct copy of Motion to Quash Deposition Subpoenas Duces Tecum Served on Non-Parties, John Taves and Pacific Northwest Software, filed October 19, 2006 in *ConnectU, LLC v. Zuckerberg, et al*; Case No. 04-cv-11923-DPW, District of Massachusetts.

9. Attached hereto as **Exhibit I** is a true and correct copy of the October 16, 2006, email from PNS' counsel to Facebook's counsel indicating PNS objected to producing responsive documents.

10. Attached hereto as **Exhibit J** is a true and correct copy of the Subpoena Duces Tecum for Documents and Videotape Deposition, served December 28, 2006 to PNS in this action.

11. Attached hereto as **Exhibit K** is a true and correct of relevant excerpts of the October 24, 2006, hearing transcript in *ConnectU, LLC v. Zuckerberg, et al*; Case No. 04-cv-11923-DPW, District of Massachusetts.

12. Attached hereto as **Exhibit L** is a true and correct copy of relevant exhibits from PNS' production. **[CONFIDENTIAL DOCUMENT SUBMITTED SEPARATELY UNDER SEAL]**

13. Attached hereto as **Exhibit M** is a true and correct copy of relevant exhibits from ConnectU's California production. **[CONFIDENTIAL DOCUMENT SUBMITTED SEPARATELY UNDER SEAL]**

14. Attached hereto as **Exhibit N** is a true and copy of relevant exhibits from iMarc LLC's September 26, 2006, production.

15. Attached hereto as **Exhibit O** is a true and correct copy of relevant excerpts from Winston Williams' June 19, 2007, deposition transcript. **[CONFIDENTIAL DOCUMENT SUBMITTED SEPARATELY UNDER SEAL]**

16. Attached hereto as **Exhibit P** is a true and correct copy of relevant exhibits from David Gucwa's March 12, 2007, production.

17. Attached hereto as **Exhibit Q** is a true and correct redline comparison of Facebook's original August 17, 2005 complaint and the Second Amended Complaint.

18. Attached hereto as **Exhibit R** is a true and correct copy of the Response of Divya Narendra to First Set of Requests for Admission, served October 31, 2005. Plaintiffs include Mr. Narendra's responses, though the responses served by Messrs. Winklevoss were substantively the same. To reduce the burden on the Court, Plaintiffs are providing only Mr. Narendra's responses.

19. Attached hereto as **Exhibit S** is a true and correct copy of the March 2, 2007, Report and Recommendation on Facebook's Motion to Dismiss, adopted by the District of Massachusetts, March 28, 2007.

20. Attached hereto as **Exhibit T** is a true and correct copy the Amended Response of Defendant Divya Narendra to to Form Interrogatories, served on April 3, 2006. Plaintiffs include Mr. Narendra's responses, though the responses served by Messrs. Winklevoss were substantively the same. To reduce the burden on the Court, Plaintiffs are providing only Mr. Narendra's responses.

21. Attached hereto as **Exhibit U** is a true and correct copy of ConnectU LLC's August 5, 2005, Limited Liability Operating Agreement, Bates labeled as C011285 – C011335. **[CONFIDENTIAL DOCUMENT SUBMITTED SEPARATELY UNDER SEAL]**

22. Attached hereto as **Exhibit V** is a true and correct copy of the Amended Response of Defendant Divya Narendra to Plaintiff's First Set of Special Interrogatories (1-23), served March 9, 2006. Plaintiffs include Mr. Narendra's responses, though the responses served by Messrs. Winklevoss were substantively the same. To reduce the burden on the Court, Plaintiffs are providing only Mr. Narendra's responses.

23. Attached hereto as **Exhibit W** is a true and correct copies of the Declaration of Divya Narendra in Support of Plaintiff's Supplemental Brief in Opposition to Motion to Dismiss, Presenting New Evidence and Supplemental Authority in View of *Pramco*; Declaration of Cameron Winklevoss in Support of Plaintiff's Supplemental Brief in Opposition to Motion to Dismiss, Presenting New Evidence and Supplemental Authority in View of *Pramco*; and Declaration of Tyler Winklevoss in Support of Plaintiff's Supplemental Brief in Opposition to Motion to Dismiss, Presenting New Evidence and Supplemental Authority in View of *Pramco*, all

filed June 12, 2006 in *ConnectU, LLC v. Zuckerberg, et al*; Case No. 04-cv-11923-DPW, District of Massachusetts.

24. Attached hereto as **Exhibit X** is a true and correct copy of the Plaintiff's Supplemental Brief in Opposition to Motion to Dismiss, Presenting New Evidence and Supplemental Authority in View of *Pramco*. **[CONFIDENTIAL DOCUMENT SUBMITTED SEPARATELY UNDER SEAL]**

25. Attached hereto as **Exhibit Y** is a true and correct copy of the November 3, 2005 Order Granting Facebook's *Ex Parte* Application to Reschedule the November 17, 2005 Hearing in Regards to Defendants' Motion to Quash.

26. Attached hereto as **Exhibit Z** is a true and correct copy of First set of Form Interrogatories to Divya Narendra, served on September 26, 2005; Notice of Deposition of Defendant Divya Narendra, served November 3, 2005; TheFacebook, Inc.'s First Set of Special Interrogatories to Defendant Divya Narendra, served November 3, 2005; and TheFacebook, Inc.'s First Set of Requests for Production to Defendant Divya Narendra, served November 3, 2005 Plaintiffs include discovery served on Mr. Narendra, though the discovery served on Messrs. Winklevoss was substantively the same. To reduce the burden on the Court, Plaintiffs are providing only Mr. Narendra's discovery.

27. Attached hereto as **Exhibit AA** is a true and correct copy of the November 21, 2005, Order Granting Facebook's *Ex Parte* Application to Compel Depositions of Defendants Related to Personal Jurisdiction, requiring Defendants to appear for deposition on or before December 23, 2005.

28. Attached hereto as **Exhibit BB** is a true and correct copy of the January 6, 2006, Order Granting Facebook, Inc.'s *Ex Parte* Application to Compel Limited Deposition on the Subject of Personal Jurisdiction, requiring ConnectU to appear for deposition.

29. Attached hereto as **Exhibit CC** is a true and correct copy of Notice of Motion, Motion, and Memorandum of Points and Authorities in Support of TheFacebook, Inc.'s Motion to Compel Limited Depositions on the Subject of Personal Jurisdiction, filed November 30, 2005; Notice of Motion and Memorandum of Points and Authorities in Support of TheFacebook, Inc.'s

Motion to Compel Supplemental Responses and Production of Documents in Response to its First Sets of Special Interrogatories and Requests for Production, filed January 17, 2006; Notice of Motion and Memorandum of Points and Authorities in Support of TheFacebook, Inc.'s Motion to Compel Supplemental Responses to Facebook, Inc.'s First Sets of Form Interrogatories and Requests for Admission, filed January 31, 2006. **[CONFIDENTIAL DOCUMENT SUBMITTED SEPARATELY UNDER SEAL]**

30. Attached hereto as **Exhibit DD** is a true and correct copy of the February 17, 2006, Order granting, in-part, Facebook's Motions to Compel.

31. Attached hereto as **Exhibit EE** is a true and correct copy of the Declaration of ConnectU LLC, dated March 3, 2006, indicating that a diligent search had been performed and all responsive documents were produced,

32. Attached hereto as **Exhibit FF** is a true and correct copy of relevant excerpts of the June 22, 2006, hearing transcript in *ConnectU, LLC v. Zuckerberg, et al*; Case No. 04-cv-11923-DPW, District of Massachusetts.

33. Attached hereto as **Exhibit GG** is a true and correct copy of the Notice of *Ex Parte* Application to Compel Depositions of Defendants Related to Personal Jurisdiction; Memorandum of Points and Authorities, filed November 21, 2005.

34. Attached hereto as **Exhibit HH** is a true and correct copy of the Amendment to Second Amended Response of Defendant ConnectU LLC to Plaintiff's First Set of Special Interrogatories (1-23), served June 21, 2006.

35. Attached hereto as **Exhibit II** is a true and correct copy of the Order re: (1) Defendant ConnectU LLC's Motion for Sanctions in Violation of Court Order; (2) Defendant Cameron Winklevoss, Tyler Winklevoss, Howard Winklevoss, and Divya Narendra's Motion to Seal Records Filed in Connection With Defendant ConnectU LLC's Motio for Sanctions in Violation of Court Order; (2&3) Plaintiff's and Defendants' Motions to File Under Seal; AND, (4) Plaintiff TheFacebook Inc.'s Motion to Compel Supplemental Responses to Facebook Inc.'s First Set of Form Interrogatories and Requests for Admission, entered March 3, 2006.

36. Attached hereto as **Exhibit JJ** is a true and correct copy of the Response and

Objections of Defendant Divya Narendra to Plaintiffs First Set of Special Interrogatories (Nos 1-23), served December 5, 2005.

37. Attached hereto as **Exhibit KK** is a true and correct copy of the Response of Defendant Divya Narendra to Form Interrogatories, served October 31, 2005.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 19th day of September, 2007, at Menlo Park, California.

/s/ Theresa A. Sutton /s/
Theresa A. Sutton

CERTIFICATE OF SERVICE

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on September 19, 2007.

Dated: September 19, 2007.

Respectfully submitted,

/s/ Theresa A. Sutton /s/
Theresa A. Sutton